

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,	}	Case No. 12CR4409-H	
Plaintiff,		}	ORDER DENYING DEFENDANT’S
v.			MOTION TO REDUCE SENTENCE
FERNANDO GUTIERREZ-ZUNIGA,			UNDER 18 U.S.C. § 3582(c)(2)
Defendant.	}		

On May 13, 2015, Defendant Fernando Gutierrez-Zuniga (“Defendant”) filed a motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) based on Amendment 782 to the United States Sentencing Guidelines (“U.S.S.G.”) as promulgated by the United States Sentencing Commission. (Doc. No. 23.) The Defendant argues “that the original grant of a fast-track departure does not preclude a reduction for the amendment.” (Doc. No. 23-1 at pg. 2.) The Defendant seeks to reduce his original custodial sentence of 46 months down to 41 months. Id.

On May 28, 2015, the Government filed its opposition to the Defendant’s motion to reduce his sentence. (Doc. No. 25.) The Government opposes the reduction of the Defendant’s sentence arguing that “a ‘fast-track’ reduction for early disposition of certain cases, under § 5K3.1, is a departure, and if a defendant received a sentence below the new Guideline range (calculated without that departure) as a result of a fast-track

1 departure, he is not eligible for a sentencing reduction.” Id. On June 2, 2015, the
2 Defendant filed a reply to the Government’s opposition. (Doc. No. 26.)

3 The Court turns to the applicable Guideline language and law to evaluate the
4 motion for a sentence reduction under § 3582(c)(2). U.S.S.G. § 1B1.10(b)(1) (Nov. 1,
5 2014) provides that:

6
7 In determining whether, and to what extent, a reduction in the defendant’s
8 term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy
9 statement is warranted, the court shall determine the amended guideline
10 range that would have been applicable to the defendant if the
11 amendment(s) to the guidelines listed in subsection (d) had been in effect
12 at the time the defendant was sentenced. In making such determination, the
13 court shall substitute only the amendments listed in subsection (d) for the
14 corresponding guideline provisions that were applied when the defendant
15 was sentenced and shall leave all other guideline application decisions
16 unaffected.¹

17 But “the court shall not reduce the defendant’s term of imprisonment under 18
18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of
19 the amended guideline range determined under subdivision (1) of this subsection.”
20 U.S.S.G. § 1B1.10(b)(2)(A) (Nov. 1, 2014). The commentary to § 1B1.10 clarifies that
21 the “[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an
22 amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the
23 guideline range that corresponds to the offense level and criminal history category
24 determined pursuant to §1B1.1(a), which is determined before consideration of any
25 departure provision in the Guidelines Manual or any variance).” U.S.S.G. § 1B1.10 cmt.
26 n.1(A) (Nov. 1, 2014).

27 An exception exists under U.S.S.G. § 1B1.10(b)(2)(B) (Nov. 1, 2014) if a
28 defendant was sentenced below the Guideline range pursuant to a government motion

¹ Amendment 782 to the U.S.S.G. has been added to subsection (d), making the application of
Amendment 782 retroactive to sentences imposed prior to its promulgation by the Sentencing
Commission. U.S.S.G. § 1B1.10(d) (Nov. 1, 2014).

1 reflecting a defendant's substantial assistance under U.S.S.G. § 5K1.1 (at the time of
2 sentencing) or under Fed. R. Crim. P. 35(b) (post-sentencing).

3 In Dillon v. United States, 130 S. Ct. 2683, 2691 (2010), the Supreme Court
4 explained the limited nature of § 3582(c)(2) proceedings and the process for ruling on
5 motions to reduce sentences under that section.

6
7 Consistent with the limited nature of §3582(c)(2) proceedings,
8 §1B1.10(b)(2) also confines the extent of the reduction authorized. Courts
9 generally may “not reduce the defendant’s term of imprisonment under 18
10 U. S. C. §3582(c)(2) . . . to a term that is less than the minimum of the
11 amended guideline range” produced by the substitution. §1B1.10(b)(2)(A).
12 Only if the sentencing court originally imposed a term of imprisonment
13 below the Guidelines range does §1B1.10 authorize a court proceeding
14 under §3582(c)(2) to impose a term “comparably” below the amended
15 range. §1B1.10(b)(2)(B).

16 In Dillon, the Supreme Court required district courts to follow a two-step process
17 in ruling on motions under § 3582(c)(2). The Supreme Court cautioned that
18 “[f]ollowing this two-step approach, a district court proceeding under §3582(c)(2) does
19 not impose a new sentence in the usual sense.” Id. Furthermore, “proceedings under 18
20 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of
21 the defendant.” U.S.S.G. § 1B1.10(a)(3). The two-step process provided by Dillon, 130
22 S. Ct. at 2691-92, is as follows:

23 At step one, §3582(c)(2) requires the court to follow the Commission’s
24 instructions in § 1B1.10 to determine the prisoner’s eligibility for a
25 sentence modification and the extent of the reduction authorized.
26 Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing]
27 the amended guideline range that would have been applicable to the
28 defendant” had the relevant amendment been in effect at the time of the
initial sentencing. “In making such determination, the court shall
substitute only the amendments listed in subsection (c) for the
corresponding guideline provisions that were applied when the defendant
was sentenced and shall leave all other guideline application decisions
unaffected.”

1 At step two of the inquiry, §3582(c)(2) instructs a court to consider any
2 applicable §3553(a) factors and determine whether, in its discretion, the
3 reduction authorized by reference to the policies relevant at step one is
4 warranted in whole or in part under the particular circumstances of the
5 case. Because reference to §3553(a) is appropriate only at the second step
6 of this circumscribed inquiry, it cannot serve to transform the proceedings
7 under §3582(c)(2) into plenary resentencing proceedings.

8 The district court's discretion at step two is limited. See Freeman v. United States
9 131 S. Ct. 2685, 2693 (2011) (Noting that "[t]he binding policy statement governing
10 §3582(c)(2) motions places considerable limits on district court discretion"). In
11 Freeman, the Supreme Court further explained that "[i]n an initial sentencing hearing,
12 a district court can vary below the Guidelines; but, by contrast, below-Guidelines
13 modifications in §3582(c)(2) proceedings are forbidden, USSG §1B1.10(b)(2)(A),
14 except where the original sentence was itself a downward departure [pursuant to]
15 §1B1.10(b)(2)(B)." Freeman at 2693. As a result, this Court is not permitted to engage
16 in a de novo resentencing in a § 3582(c)(2) proceeding and therefore cannot grant the
17 same departures or variances granted at the initial sentencing hearing, unless that
18 departure was granted pursuant to a government's motion for substantial assistance as
19 defined by the Guidelines.² And the Ninth Circuit recognized the limitation in
20 § 1B1.10(b)(2)(A). United States v. Davis, 739 F.3d 1222, 1226 (9th Cir. 2014) (Noting
21 that "[a]lthough the Commission crafted § 1B1.10(b), it is Congress that has made
22 policy statements available as a general matter and binding on the courts").

23 The Defendant further argues that the commentary to § 1B1.10 is inconsistent
24 with the plain language of § 1B1.10(b)(1). The Court disagrees. The Ninth Circuit


25 ² The Court rejects the Defendant's argument that "fast-track" is a form of "substantial
26 assistance." The commentary to § 1B1.10 makes it clear that "substantial assistance" is defined as a
27 government motion under "§5K1.1 (Substantial Assistance to Authorities) (authorizing, upon
28 government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C.
§ 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory
minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the
court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance)."
U.S.S.G. § 1B1.10 cmt. n.3 (Nov. 1, 2014).

1 explained the application of the commentary to § 1B1.10. United States v. Pleasant, 704
2 F.3d. 808, 812 (9th Cir. 2013) (Noting that the commentary to § 1B1.10 “was added to
3 resolve a circuit split that had arisen over whether a defendant’s ‘applicable guideline
4 range’ should be derived before or after the application of a departure or variance” and
5 clarifying that the amended Guideline range “is derived pre-departure and pre-
6 variance”).

7 With the legal framework in mind, the Court turns to its application to the
8 Defendant’s motion in this case. The Court sentenced the Defendant to a custodial term
9 of 46 months, after departing downward four levels for “fast-track” under § 5K3.1. No
10 departures were granted pursuant to a government motion reflecting a defendant’s
11 substantial assistance under § 5K1.1 or under Fed. R. Crim. P. 35(b) in this matter. At
12 a total offense level of 26 with a criminal history category of I, under Amendment 782,
13 the amended Guideline range for the term of imprisonment in this case is 63 to 78
14 months. The Defendant’s original sentence of 46 months, with the “fast-track”
15 departure, is below the amended Guideline range. As a result of the limitation in
16 § 1B1.10(b)(2)(A), the Defendant is not entitled to a reduction of his sentence.
17 Additionally, the Court declines to reduce the Defendant’s sentence as a discretionary
18 matter. Accordingly, the Court DENIES the Defendant’s motion to reduce his sentence
19 under 18 U.S.C. § 3582(c)(2).³

20 IT IS SO ORDERED.

21 DATED: July 23, 2015

22 
23 HONORABLE MARILYN L. HUFF
24 UNITED STATES DISTRICT JUDGE
25
26
27

28 ³ The Court denies the Defendant’s motion based on the limitation in § 1B1.10(b)(2)(A). The Sentencing Commission has the authority to amend the limitation to allow the Court to consider a “fast-track” departure in a § 3582(c)(2) proceeding should the Sentencing Commission elect to do so.